

**STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF)	
)	
WAL-MART STORES EAST, LP)	
d/b/a WAL-MART SUPERCENTER #922)	PERMIT NO. DL31-21286
2363 HIGHWAY 135 NORTHWEST)	
CORYDON, INDIANA 47112)	
)	
Applicant.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

Wal-Mart Stores East, LP, d/b/a Wal-Mart Supercenter #922, 2363 Highway 135 Northwest, Corydon, Indiana 47112, permit number DL31-21286 (the “Applicant” or the “Wal-Mart”), is the Applicant for a type 208-3¹ Alcohol and Tobacco Commission (the “Commission” or the “ATC”) permit. The application was assigned to the Alcoholic Beverage Board of Harrison County (“Local Board”). The Local Board held a hearing on February 1, 2005, and voted 2-2 with respect to this permit. On March 15, 2005, the Commission voted to deny the application at its regularly held meeting.

On March 29, 2005, the Applicant filed Petitioner’s Request for Administrative Review and Request to Appeal Commission’s Denial of Application, and the matter was assigned to the Commission Hearing Judge U-Jung Choe (“Hearing Judge”). The matter was set for hearing on December 5, 2006, and that time, witnesses were sworn, evidence was heard, and the matter was taken under advisement. The Hearing judge also took judicial notice of the entire contents of the file related to this cause. Having been duly advised of the facts and law

¹ Liquor, beer and wine (drug store) dealer located in an unincorporated area.

at issue, the Hearing Judge now submits these Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. PROCEDURAL HISTORY

1. On March 18, 2005, the Applicant received the Notice of Denial stating that the Commission rejected its application.

2. On March 29, 2005, the Applicant timely filed its request for administrative review and request for appeal within the fifteen (15) day deadline required by 905 IAC 1-36-2.

3. No remonstrators filed a petition for intervention as remonstrator, as required by 905 IAC 1-36-2.

4. On or about April 18, 2005, the Applicant filed its Motion for Reconsideration of the Commission's decision to deny the application.

5. On July 19, 2005, the Applicant filed Petitioner's Motion for Pre-Hearing Conference.

6. On August 1, 2005, the Hearing Judge issued an Order staying the administrative proceedings pending the Indiana Supreme Court's decision in the appeal of *Ind. Ass'n of Beverage Retailers, Inc. v. Ind. Alcohol and Tobacco Comm'n*, 809 N.E.2d 374 (Ind. Ct. App. 2004).

7. On October 27, 2005, the Indiana Supreme Court issued its decision in *Ind. Ass'n of Beverage Retailers, Inc.*, 836 N.E.2d 255 (Ind. 2005). The Supreme Court held that to pursue an administrative or judicial review of a Commission action, a person must first demonstrate standing as an aggrieved or adversely affected person in accordance with the Commission's rules.

8. On November 17, 2005, the Applicant filed a Motion for Reconsideration of the Commission's denial of the application, citing the decision in *Ind. Ass'n of Beverage Retailers, Inc.*

9. On June 20, 2006, the Commission denied the Applicant's Motion for Reconsideration at its regularly held meeting.

10. On September 11, 2006, the Applicant filed its Motion for Administrative Review and Request for the Issuance of Findings of Fact.

11. On or about September 12, 2006, the Hearing Judge issued an Order setting a pre-hearing conference date, denying the Applicant's motion for reversal of the Commission's decision, and finding the Applicant to be the only party to this appeal.

12. On September 14, 2006, a pre-hearing conference was held.

13. On September 20, 2006, the Hearing Judge issued an Entry Regarding Pre-Hearing Conference, scheduling a hearing date of October 25, 2006.

14. On October 18, 2006, the Applicant filed its Witness List.

15. On or about October 18, 2006, the Commission received a letter from Fred K. Cammack, a remonstrator, requesting that the hearing date be rescheduled.

16. On October 19, 2006, the Hearing Judge issued an Order continuing the hearing to December 5, 2006.

17. On October 25, 2006, the Applicant filed its Objections to Granting of Continuance without Consent of Petitioner, requesting an earlier hearing date and objecting to the Hearing Judge's grant of a continuance.

18. On October 27, 2006, the Hearing Judge issued an Order denying the Applicant's request for an earlier hearing date.

19. On December 5, 2006, the Hearing Judge conducted a hearing regarding this appeal.

III. EVIDENCE BEFORE THE LOCAL BOARD

A. The following individuals testified before the Local Board in favor of the Applicant in this cause:

1. Lisa Goldner, attorney for the Applicant;
2. Alex Intermill, attorney for the Applicant;
3. Isabel Piccione, Store Manager;
4. Michele Moore, Wal-Mart employee;
5. George Heald, Wal-Mart employee;
6. Chris Dunn, Wal-Mart employee;
7. Kenneth Woodard, Wal-Mart employee;
8. Vickie Chism, Wal-Mart employee;
9. Marcia Cundiff, Wal-Mart employee; and
10. Linda Coogle, Wal-Mart employee.

B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

1. Manager's Statement by Isabel Piccione, Store Manager, February 1, 2005;
2. Exhibit 1 - Indiana Board of Pharmacy Permit, issued July 14, 1997;
3. Exhibit 2 - Photographs of the Wal-Mart;
4. Exhibit 3 - Affidavit of Compliance Regarding Notice Posting, January 21, 2005;
5. Exhibit 4 - Harrison County Property Tax Clearance Form No.1, November 25, 2003;
6. Exhibit 5 - Petitions in Support of the Applicant containing 1,619 customer signatures, with 96% in favor of the application;
7. Exhibit 6 - Summary of Alcohol Management Lesson, September 23, 2004;
8. Exhibit 7 - Alcoholic Beverage Signage, "Wal-Mart Adheres to the Following State and Federal Laws";
9. Exhibit 8 - Electronic Alarm System Bottle Cap;
10. Exhibit 9 - 2004 Annual Report Excerpt;
11. Exhibit 10 - *Wal-Mart's Presence In Indiana Includes: Stores, Clubs, Distribution Centers and Other Facilities (as of 10/31/04)*, Indiana Community Impact, January 26, 2005;
12. Exhibit 11 - *Wal-Mart is Working for Everyone*, memorandum from President and CEO of Wal-Mart, Lee Scott, January 13, 2005;
13. Exhibit 12 - *Wal-Mart, SAM'S CLUB Join Tsunami Relief Effort*, news release, December 30, 2004;
14. Exhibit 13 - *Wal-Mart "M.A.C.K. Pack" Connect 900,000 Service Men and Women to Loved Ones*, news release, November 8, 2004;

15. Exhibit 14 – Thirty-three (33) letters in support of the Applicant addressed to the Indiana Alcohol and Tobacco Commission containing signatures with no addresses or contact information, January 2004;
 16. Exhibit 17 – Impact and Benefits to City of Corydon, Harrison County, financial figures representing the impact and benefits derived from Wal-Mart;
 17. Exhibit __ - A map depicting other alcoholic beverage outlets within one-mile radius from the Applicant.
- C. The following individuals testified before the Local Board against the Applicant in this cause:
1. Gordon Ingle, a resident of Corydon, Indiana;
 2. John Douglass, a resident of Corydon, Indiana;
 3. Sean Hawkins, a resident of Corydon, Indiana;
 4. Carolyn Scott, a resident of Corydon, Indiana;
 5. Greg Carter, a resident of Corydon, Indiana;
 6. Teresa Douglass, a resident of Corydon, Indiana; and
 7. Darcy Hollingsworth, a resident of Corydon, Indiana.
- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:
1. Exhibit 1 - Summary of Police Runs to Wal-Mart by Harrison County Sheriff's Department;
 2. Exhibit 2 - *New Report Details Wal-Mart's Labor Abuses and Hidden Costs*, News From Congressman George Miller 7th Dist., February 16, 2004;
 3. *Wal-Mart Needs No More License-to-Squeeze*, Corydon Democrat, November 3, 2005, at __;
 4. George Miller, *Everyday Low Wages: The Hidden Price We All Pay for Wal-Mart*, A Report By the Democratic and the Education and the Workforce, February 16, 2004;
 5. *Wal-Mart Living Wage Campaign*, unknown source, unknown date;
 6. Roger Dupuis II, *Wal-Mart Critics Bring Battle to Bargaining Table*, unknown source, (January 25, 2005);
 7. *Current Legal Developments Concerning Wal-Mart*, <http://www.wal-martlitigation.co/currentd.htm>, (no date);
 8. Veronica Whitney, *Wal-Mart Liquor License Suspended*, unknown source (January 26, 2005);
 9. Thirteen (13) letters from individuals opposing the issuance of permit; and
 10. Petitions in Opposition to a Liquor Permit for Wal-Mart, containing 1,140 signatures.

IV. EVIDENCE BEFORE THE COMMISSION

- A. The following individuals testified before the Commission in favor of the Applicant in this cause:

1. Fatorma Siafa, Store Manager. The Applicant desires to offer “one-stop shopping” to its customers, who regularly request that the Applicant sell liquor in addition to beer and wine. The Applicant has not had any ATC violations concerning the sale of alcohol. The Applicant has implemented extensive training measures for all of its employees to ensure compliance with all alcoholic beverage laws, which include a zero-tolerance policy with automatic termination for violating an alcoholic beverage law. The Applicant has not experienced any problems with theft of alcoholic beverages, due in large part to its state-of-the-art security system and salaried loss prevention asset protection coordinator. The Applicant’s employees also deter theft by monitoring the aisle in which alcoholic beverages are shelved, and implementing the “10-Foot Rule,” which requires employees to make eye contact and greet every customer within ten feet of the employee. The Applicant makes charitable contributions to the local community. The population of Harrison County and Corydon, Indiana has increased. There is a need and desire for the permit, and the Applicant is a store of good repute in the community.

2. Michael Lloyd, Marketing and Grocery District Manager. The Applicant has no ATC violations. The Applicant will equip the store with new digital security camera technology as part of an upcoming remodel. The Applicant takes training and compliance very seriously and regularly audits individual stores, including store #922, to ensure proper training and compliance. Customers regularly request that the Applicant sell liquor in addition to beer and wine.

3. Dean Pritchard, Co-Manager of Grocery Department. Mr. Pritchard oversees approximately 150 employees in the Grocery Department. Each employee is trained in compliance with ATC law and the employees do a good job monitoring the alcoholic beverage

aisle. The Applicant's security measures include software in its cash registers that will not allow cashiers to sell alcohol on statutorily prohibited dates or at prohibited times, and requires cashiers to enter the birth date of a customer desiring to purchase alcohol to ensure that he or she is at least twenty-one years old.

4. Katherine Morgan, Department Manager-Crafts. Ms. Morgan attended the Local Board Hearing. Ms. Morgan collected the majority of the signatures of customers polled regarding the permit and did so in a random and fair manner. The Applicant's customers constantly express their desire for the Applicant to sell beer, wine, and liquor so that they can enjoy the convenience of "one-stop shopping." The local police chief also works at the Applicant's store, which provides additional security in the store.

5. Priscilla Sadler, Customer Service Manager. Ms. Sadler oversees approximately sixty-five (65) cashiers and conducts monthly meetings with cashiers to inform them of any changes in policy or the law that impact the check-out process and/or upcoming dates on which no alcohol may be sold. Ms. Sadler also oversees quarterly retraining of cashiers regarding compliance with ATC laws. Customers regularly express their desire for the Applicant to sell liquor as well as beer and wine.

6. Lisa Goldner, attorney for the Applicant.

7. Alex Intermill, attorney for the Applicant.

B. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

1. Exhibit A - Manager's Statement by Fatorma Siafa;
2. Exhibit 1 – Petitions collected prior to the Local Board Hearing containing 1,619 customer signatures, with 96% in favor of the permit application;
3. Exhibit 2 - Customer petitions containing 486 signatures, with 76% in favor of the permit and three (3) letters of support for the permit from local business owners;

4. Exhibit 3 - *Wal-Mart is Now Indiana's Top Employer*, www.insideindianabusiness.com (last visited February 3, 2006);
5. Exhibit 4 - *Indiana Alcohol Quantity Limits*, stating that Indiana law restricts the amount of alcohol customers/members can purchase in a single transaction, <http://mywire-wal-mart.com> (accessed April 4, 2006);
6. Exhibit 5 - Signage depicting state and federal alcoholic beverage laws displayed in aisles containing alcoholic beverages;
7. Exhibit 6 - Statistics showing Wal-Mart's positive impact on Indiana, www.walmartfacts.com (accessed November 3, 2006);
8. Exhibit 7 - *Wal-Mart Saves Working Families \$2,329 Per Year; Has Net Positive Impact on Real Wages and Job Creation*, Press Release, (November 4, 2005);
9. Exhibit 9 - *Statement on poll Showing Americans Believe Wal-Mart is a Good Place to Shop*, Press Release, December 15, 2005;
10. Exhibit 10 - Statistics showing the Applicant's charitable contributions;
11. Exhibit 11 - Maps identifying the locations of other Type 208 permits with respect to the location of the Applicant;
12. Exhibit 12 - Census 2000 Population Compared to 1990;
13. Exhibit 13 - Stats Indiana, Population Estimates for Indiana Counties, depicting population growth of Harrison County, Indiana, 2005;
14. Exhibit 14 - Summary of security measures implemented by the Applicant;
15. Exhibit 15 - Maps identifying the locations of other Type 208 permittees with respect to the location of the Applicant;
16. Exhibit 16 - *Are You Doing Your Part? 65% of Underage youth Who Drink Get Alcohol From Family and Friends*, The Century Council, no date; and
17. Exhibit 17 - A letter from Joan Hendrickson of the ATC comparing the number of violation charges between the drug stores and the package liquor stores and/or restaurants. February 1, 2005.

C. The following individuals testified before the Commission against the Applicant in this cause:

1. Fred K. Cammack, Town Council President, Corydon, Indiana. Mr. Cammack testified that there was no need for this permit, as the already existing package liquor stores in Corydon, Indiana provide a sufficient number of alcoholic beverage outlets.

2. Gordon Pendleton, a resident of Corydon, Indiana. Mr. Pendleton attended the Local Board Hearing and testified in opposition to the permit. Mr. Pendleton questioned the validity of the petitions submitted by the Applicant. Mr. Pendleton testified that he believes

there is no need for the permit, as the current alcoholic beverage outlets are sufficient for the 2,800 residents of Corydon and the 9,000 people in the surrounding area.

3. Harold McBride, Harrison County Local Board Member. Mr. McBride was born and raised in Harrison County, Indiana. Mr. McBride was appointed to the Local Board in December, 2005 by the Town Council. As a Local Board member, no one has asked him to support the permit. Rather, community members have asked him to vote against the permit.

4. Carl Dooley, Harrison County Local Board Member. Mr. Dooley is a life-long resident of Harrison County. Mr. Dooley testified that he does not believe that the Applicant can control the sale of alcohol. Mr. Dooley questioned the effectiveness of the software safeguards implemented at the Applicant's cash registers. Mr. Dooley testified that there are currently a sufficient number of alcoholic beverage outlets in Harrison County.

5. Darcy Hollingsworth, Manager, Corydon Holiday Liquors Package Store. Ms. Hollingsworth indicated that she is opposed to the sale of alcoholic beverages in a grocery store or pharmacy due to accessibility to minors. Ms. Hollingsworth collected signatures of people in opposition to the permit. The majority of the people opposed to the permit are concerned with underage drinking and the alleged problems with alcohol abuse in the community. Ms. Hollingsworth testified that she believes there are a sufficient number of existing alcoholic beverage outlets in Corydon, Indiana, and that there is no need for the permit. Ms. Hollingsworth does not believe the cashiers enter the age of a customer purchasing alcohol, as required by the cash register software. Ms. Hollingsworth also submitted a letter in opposition to the issuance of the permit to the Commission via U.S. mail on November 30, 2006.

D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

None.

E. The following post-hearing submission and evidence were received by the Commission via U.S. mail:

1. A letter in opposition to the issuance of the permit from Mike Deatrick, Sheriff of Harrison County, Harrison County Sheriff Department, November 30, 2006; and
2. The Applicant's Proposed Findings of Fact and Conclusions of Law.

V. FINDINGS OF FACT

1. Wal-Mart Stores East, LP, d/b/a Wal-Mart Supercenter #922, 2363 Highway 135 Northwest, Corydon, Indiana 47112, permit number DL31-21286, is the Applicant for a Type 208-3 permit. (ATC File).

2. The Applicant meets the qualifications to hold a permit pursuant to Ind. Code § 7.1-3-4-2, Ind. Code § 7.1-3-5-2, Ind. Code § 7.1-3-10-2 and Ind. Code § 7.1-3-15-2. (Local Board Hearing; ATC Hearing).

3. The permit is not being placed within two hundred (200) feet of a church or school. (ATC File; Local Board Hearing; ATC Hearing).

4. The permit is being placed in a commercial location and is not being placed in a residential district as referred to in Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1. (ATC File; ATC Hearing).

5. The Applicant is of good moral character and of good reputation in the community as required by 905 IAC 1-27-1. (Local Board Hearing; ATC Hearing).

6. The Applicant's store is similar to stores of competitors holding alcoholic beverage permits in Indiana. (Local Board Hearing; ATC Hearing; ATC File).

7. The Applicant's employees are extensively trained to avoid problems with theft and the sale of alcoholic beverages to minors, which includes automatic termination of the employee involved on the first offense. (Local Board Hearing, ATC Hearing).

8. Thirty-nine (39) persons appeared at the Local Board Hearing to remonstrate against the issuance of this permit. Approximately nine (9) persons appeared at the ATC Hearing to remonstrate against the issuance of this permit. Remonstrators have also presented evidence to indicate that there is no need or desire in the Corydon community for the permit by submitting petitions containing 1,140 signatures and fourteen (14) letters opposing to the issuance of the permit. (Local Board Hearing; ATC Hearing; ATC File).

9. The Applicant has presented evidence to indicate that there is need and desire in the Corydon community for the permit by submitting petitions containing 1,619 signatures with 96% in favor of the permit, four hundred eighty-six (486) signatures of customers with 76% in favor of the permit, and thirty-three (33) letters in support of the permit. (Local Board Hearing; ATC Hearing; ATC File).

10. The weight of the evidence, which includes petitions submitted by the Applicant, witnesses' testimony concerning customer inquiries, and the availability of Type 208-3 permits in Harrison County, indicates that there is a need and desire in the Corydon community for the Applicant to obtain the permit. (Local Board Hearing; ATC Hearing).

11. None of the remonstrators timely filed a petition for intervention as remonstrator as required by 905 IAC 1-36-2(b). (ATC Files).

12. The Applicant has submitted substantial evidence that it is qualified to hold a Type 208-3 drug store permit. (Local Board Hearing; ATC Hearing).

13. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and Ind. Code § 7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.

3. The Commission is authorized to act upon proper application. *Id.*

4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission, including a public hearing and a review of the record and documents in the Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).

6. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).

7. The 2-2 vote does not constitute a recommendation of the Local Board. Ind. Code § 7.1-2-4-16; Ind. Code § 7.1-3-19-11. The Commission, however, is authorized to act on the application irrespective of such vote. *See* Ind. Code § 7.1-3-19-1; Ind. Code § 7.1-3-19-10; *Indiana Alcoholic Beverage Commission v. State ex rel. Harmon*, 379 N.E.2d 140, 142, 146-147 (Ind. 1978).

8. The testimony of the Local Board members who appeared at the ATC Hearing will not be considered since they are not “remonstrators.” 905 IAC 1-36-2(a) provides, in relevant part: “remonstrator means a person who appeared, personally or by counsel, as a remonstrator against the application at the local board hearing and identified himself to the local board, stating his name and address or telephone number to the board at the hearing.” *See also* Local Board Hand Book, p.8, 2007.

9. Remonstrators need not demonstrate that they would be personally aggrieved or adversely affected by the issuance of the permit to remonstrate at the Local Board Hearing or the ATC Hearing. A remonstrator is subject to the “aggrieved or adversely affected” requirement only if he or she wishes to become a “party” to seek administrative review of the Local Board’s decision. *Ind. Ass’n of Beverage Retailers, Inc.*, 836 N.E.2d at 258 (holding persons may remonstrate at a hearing even though they lack standing to pursue administrative or judicial review.)

10. The Applicant is a fit and proper applicant, has maintained a reputation for decency and law obedience, and is qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10.

11. The permit location is not in a residential district. Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1.

12. The permit location is more than 200 feet from a church or school. Ind. Code § 7.1-3-21-10 and Ind. Code § 7.1-3-21-11.

13. The Applicant is not disqualified from holding an ATC permit. Ind. Code § 7.1-3-4-2; Ind. Code § 7.1-3-5-2 and Ind. Code § 7.1-3-15-2.

14. In determining whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.

15. The weight of the evidence indicates that there is a need and desire in the community to receive the services of this Applicant. *Id.*

16. Indiana law charges the Commission with ensuring that laws and regulations are enforced uniformly throughout the state. Ind. Constitution, Art. IV, Sec. 23; *See, Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

17. To deny the application to this Applicant while granting other similarly situated applications would be arbitrary and capricious and otherwise not in accordance with the law. Ind. Code § 7.1-3-19-11.

18. The recommendation of the Local Board was not based on substantial evidence. (Local Board Hearing; ATC Hearing).

19. The Commission may reverse a local board's action in denying an application for a permit if it finds that the local board's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; or (d) without observation of procedure required by law, or unsupported by substantial evidence. Ind. Code § 7.1-3-19-11.

20. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Harrison County Local Board resulting in a 2-2 vote concerning the application for the permit number DL31-21282 was not supported by substantial evidence, was arbitrary and capricious, and otherwise not in accordance with law, and the Indiana Alcohol and Tobacco Commission should approve said application. The application of Wal-Mart Stores East, LP, d/b/a Wal-Mart Supercenter #922, 2363 Highway 135 N.W., Corydon, Indiana, for the Type 208-3 permit number DL31-21286, was sufficient and the permit applied for herein is GRANTED.

DATE: February 13, 2007

U-Jung Choe, Hearing Judge